The City of New York POLICE DEPARTMENT

April 16, 2015

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Fritz Glemaud
Tax Registry No. 915804
Narcotics Borough Brooklyn North
Disciplinary Case No. 2014-11244

The above-named member of the Department appeared before me on February 11, 2015, charged with the following:

1. Said Sergeant Fritz Glemaud, on or about August 13, 2012, at approximately 2030 hours, while assigned to Narcotics Borough Brooklyn North, in the vicinity of [redacted] in Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said location without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

The Civilian Complaint Review Board (CCRB) was represented by Jonathan Fogel, Esq. and Andre Applewhite, Esq. Respondent was represented by Anthony DiFiore, Esq. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Theresa McClendon and Detective Frank Sarrica as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After evaluating the testimony and evidence presented at the hearing, and assessing the credibility of the witnesses, this tribunal finds that there was insufficient

evidence to support a finding that Respondent engaged in misconduct by entering a home without legal authority. Accordingly, Respondent is found Not Guilty.

FINDINGS AND ANALYSIS

The following is a summary of the relevant facts that are not in dispute. On August 13, 2012, Respondent was conducting a team buy and bust operation within the confines of Narcotics Borough Brooklyn North. That evening the undercover detective working with his team advised them that a "buy" with prerecorded money had taken place at two locations within [redacted] This is a Single Room Occupancy building ("SRO"). Respondent and his team moved in to effectuate arrests at the two separate SRO units identified by the undercover detective. As a precaution, Respondent placed Sergeant Frank Sarrica at the rear of the building to prevent any attempted escape or disposal of evidence. (Tr. 71-80, 104-105, 109, 140-141)

Upon arriving at [redacted] Respondent and his team immediately moved in on Apartment [redacted] and arrested two males. According to Respondent, during this first arrest one of the detainees yelled, "Call my sister." Respondent's memo book entry recorded this first arrest at 1950 hours. (Tr. 53-63, 77-78, 80, 125, 127)

The team then proceeded to Apartment [redacted] Theresa McClendon, the occupant of that SRO unit, was home at the time. At approximately 2000 hours, Respondent knocked on McClendon's door and requested to be let in. A back and forth exchange ensued in which Respondent tried to convince McClendon to open her door. After approximately 10 minutes, Respondent admittedly used force to enter the apartment. Respondent's memo book entry recorded McClendon's arrest at 2010 hours. Other members of the

team collected evidence from the SRO. According to the Property Clerk Invoice, a scale with cocaine residue was retrieved from McClendon's apartment, as well as a Ziploc bag containing cocaine and a glassine envelope with heroin. McClendon pled guilty to criminal possession of a controlled substance in the seventh degree. She accepted an ACD and the charges were dismissed six months later. (Tr. 16-19, 24, 44, 49, 52, 78, 81-82, 125, 127-131; Resp. Ex. A)

There is no dispute that Respondent had probable cause to arrest McClendon. Furthermore, there is no dispute that Respondent forcibly entered McClendon's apartment without a warrant and without the resident's consent. The issues in this case are: whether exigent circumstances justified Respondent's warrantless entry into a home; and, if not, whether the entry amounted to sanctionable misconduct.

The required assessment of the record presents difficult problems of evaluation and judgment. In this case I credit Respondent's version of events and find that he made a reasonable and justifiable police decision to enter McClendon's apartment to prevent the destruction of evidence.

At trial, Respondent explained that he has applied for hundreds of search warrants over the course of his 20-year career, but did not do so in this case because, based on his experience and training, he determined that exigent circumstances existed to justify a forced entry into McClendon's home. Specifically, Respondent contends that he had a reasonable basis to believe that while he was knocking on her door McClendon was attempting to destroy evidence of the illegal narcotics transaction that had occurred at her apartment.

In support of his defense, Respondent testified that, based on information provided by his undercover detective, he knew that the occupants of Apartments [redacted] and [redacted] had "acted in concert" in connection with an undercover drug sale. When one of the suspects in Apartment [redacted] called out about contacting a "sister," Respondent became suspicious that this might be a signal to warn the accomplice in Apartment [redacted] that police were in the building making drug arrests. Respondent also explained that the male suspect's comments raised safety concerns because his undercover was in the building but his exact location was unknown. (Tr. 75-76, 80-81, 113)

According to Respondent, once at McClendon's door his apprehension increased. Upon arrival at Apartment 3I, he knocked on the door. The occupant was in close proximity to the entrance when he heard her ask, "Who is it?" Respondent identified himself as a police officer. At that point, he heard her "r[u]n away from the door" and then heard her "moving things around." He continued to knock. In response, McClendon called out that she was opening the door, but instead Respondent heard "rustling" and "things moving" inside. Based on these observations, he believed that McClendon was "stalling" to destroy evidence. He instructed members of his team to bring up a battering ram. Shortly thereafter, McClendon "crack[ed] open the door," with the chain lock was still on, and Respondent pushed his way into the apartment. (Tr. 81-83, 114, 120, 129-132)

Not surprisingly, McClendon's testimony at trial differed from Respondent's version of events on some salient points. McClendon testified that at approximately 2000 hours she heard a knock. She approached the door to ask who was there, but got no response. She became "nervous" when the continuous knocking got loud. McClendon

testified that she called building security but, when no one answered, she called her sister to ask her to call 911. McClendon described the man at the door as "aggressive" and recalled him yelling, "open the door now, bitch" and "open this fucking door now." During the disturbance she told the man that he had the wrong apartment. In response, he again threatened to break the door down. McClendon stated that she was "terrified" and retreated to the bedroom. At one point she heard the SRO security guard ask to let them in but she refused because she believed this was a forced statement.

McClendon estimates that this went on for 10 to 30 minutes after which Respondent "broke" the door and entered. According to McClendon, that door was "destroyed" and "mangled." It was only then that she realized it was the police. McClendon denied that she sold drugs and denied knowledge of the materials found in her home, including a scale with residue. (Tr. 18-28, 30-33, 47-48, 50-51)

Based on this evidence, CCRB countered that exigent circumstances did not exist in this case and that Respondent should be disciplined for violating the sanctity of McClendon's home. They argue that when he failed to convince her to open the door, Respondent forced his way in without any reasonable basis on which to conclude that evidence was being destroyed. For the reasons set forth below I reject this argument.

After carefully considering these conflicting accounts, I found Respondent to have been more credible than McClendon and conclude that his version of the incident is the more logical one under these circumstances. I note that Respondent was a straightforward and credible witness. He presented precise, detailed and internally consistent recitations of the events at issue in this case. His trial demeanor was sincere

and, despite his obvious interest in the outcome, gave every indication of being truthful by not embellishing the reasons for his actions or minimizing his role.

Moreover, CCRB's challenges to Respondent's credibility were unproductive. CCRB attempted to discredit Respondent's trial testimony by claiming inconsistencies with his CCRB statements. Upon review of the record, I was unable, based on the questions asked, to determine if these prior statements were actually inconsistent. Set forth below are some examples:

First, at trial Respondent testified that he requested a battering ram but did not use it. CCRB attempted to impeach this testimony with the following excerpt from his interview:

> Question: Did you ever see a battering ram?
> Answer: We have a battering ram.
> Question: Okay.
> Answer: In our vehicle. But I don't think we– we used a battering ram, no. (Tr. 91)

Any perceived differences between Respondent's statements were *de minimus* at best and had no impact on his credibility.

Second, at trial Respondent justified his forced entry by citing to exigent circumstances. CCRB used the following exchange to argue that Respondent did not make that claim during his interviews:

> Question: In general – in, in general, when – if, the undercover makes a buy and the subject goes into an apartment, do you have the authority to enter that apartment?
> Answer: Yes.
> Question: And what's the authority? What gives you—to enter the—that apartment?
> Answer: Well there's a lot of different nuances you have to play with into. But we're talking – about that we're talking about in general. It's a plain view. There's an emergency situation. There's hot pursuit there's ----

Question: So in this case what, what was it?
Answer: Unintelligible
PBA: Committed a felony in your presence pretty much right?
Answer: Yes. (Tr. 98)

The interruption of Respondent's answer, and the "unintelligible" portion of his response, seriously limited this tribunal's ability to use this portion of the CCRB interview to assess witness credibility. That the PBA representative made a comment Respondent agreed with does not override the fact that his own response was not captured.

Third, at trial Respondent recalled certain details about the arrest of the two men in Apartment [redacted] CCRB attempted to challenge this testimony with a prior CCRB statement in which he responded, "I don't remember anything specific." That answer, however, was in response to a targeted question about the arrest of only one of those suspects, Shameer McKay. The question, however, did not refer to the second male suspect arrested and therefore had limited probative value. (Tr. 95)

In contrast, this tribunal was persuaded that much of McClendon's testimony was not worthy of belief. Her lack of credibility was reflected by her demeanor on the witness stand. For example, when challenged about prior convictions and the scale with drug residue removed from her apartment, McClendon became outwardly hostile and evasive instead of simply answering the questions.

More importantly, certain aspects of McClendon's testimony did not comport with common sense and logic. First, McClendon depicted a scene where over the course of 20 minutes unidentified men banged continuously at her door as they cursed and demanded to be let in. McClendon described herself as "terrified" and yet she did not call the police. Instead, she claims to have called her sister. Although seeking the

assistance of a sibling may seem natural at times, this makes no sense given the frightening and potentially life threatening scene she described at trial.

Second, I did not believe McClendon's statement that the police failed to identify themselves at all during the entire course of the interaction. Officers might first knock and wait and see whether a door is opened before identifying themselves as police. It is highly unlikely, however, that officers would not identify themselves at all over the course of 20 minutes as they continuously banged on a door demanding entry.

Third, it is intrinsically inconsistent to tell this tribunal that she called the building security guard for help but then refused to open the door for that same security guard once he was at her door trying to clarify the situation. Her explanation that he "mumbled" at the door or that he could have had a "gun to his head" had the ring of a self-serving rationalization.

In addition, McClendon gave inconsistent testimony about whether she opened the apartment door. At trial, she denied having ever opened it. On cross examination, however, she was confronted with her prior CCRB statement that she opened the door a crack while keeping the chain lock on. She added to the confusion, at trial by denying that she looked through the peephole but later stating that she tried to "peek" to see who was there to "identify something, a person or a leg or an arm." Based on the evidence presented, she could either "peek" by cracking open the door or looking through the peephole. That she denied both at trial casted doubt on her account.

Furthermore, McClendon's description of the damage done to her apartment door was an embellishment that damaged her credibility. She testified that Respondent "destroyed" and "mangled" the door. This description was credibly contradicted by

CCRB witness Sergeant Sarrica, who went to Apartment [redacted] after the arrest and secured the door. He testified that although there was damage to a lock, the door itself was not mangled and did not have to be replaced. (Tr. 27-28, 35, 49, 62)

Having found Respondent's testimony to be credible, I make a separate finding that he made a reasonable and justifiable police decision to enter McClendon's apartment to prevent the destruction of evidence. It is axiomatic that warrantless arrests, searches and seizures inside a home are "presumptively unreasonable." *Payton v. New York*, 445 U.S. 573 (1980) The Fourth Amendment, however, is not violated every time police enter a private residence without a warrant. The presumption of unreasonableness can be overcome when exigent circumstances exist. *People v. McBride*, 14 N.Y.3d 440 (2010); *People v. Molnar*, 98 N.Y.2d 328 (2002) The recognized exigency relevant to this case is a police officer's need to prevent the imminent destruction of evidence. *Brigham City v. Stuart*, 547 U.S. 398 (2006); *People v. Clements*, 37 N.Y.2d 675 (1975) Given the existence of probable cause, the following are factors that both federal and state courts consider in suppression hearings when the imminent destruction of evidence is the alleged basis for a warrantless entry:

- a reasonable belief that the contraband is about to be removed or destroyed;
- the possible danger to the police officers guarding the site of the contraband while a warrant is sought;
- information indicating that the suspects are aware that the police are on their trail; and,
- the ready destructibility of the contraband.

The absence of any one factor is not determinative. Moreover, the belief that prompt police action was necessary, must be evaluated from the perspective of the police officer in the circumstances with which he was confronted. *United States v. Santana*, 427 U.S.

38 (1976); *People v. Clements*, 37 N.Y.2d 675 (1975); *People v. Seaberry*, 138 A.D.2d 422 (1988)

The factors applied in suppression hearings are instructive in this case. This trial, however, is a disciplinary proceeding and not a suppression hearing. If it is found that exigent circumstances did not exist at the time, this tribunal must then make a determination as to whether Respondent's warrantless entry merits disciplinary action. To sanction an employee for misconduct under the Administrative Code, there must be some showing of fault on the employee's part, either that he acted intentionally (*Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (Second Dept. 1969)), or negligently (*McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979)) Mere mistakes or errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *Ryan v. New York State Liquor Auth.*, 273 A.D. 576, 581 (Third Dept. 1948)

Case law supports Respondent's articulated reasons for concluding that exigent circumstances necessitated a warrantless entry into McClendon's home. First, it is important to note that from the outset Respondent knew that the occupants of two separate apartments were involved in the drug transaction. Respondent was reasonably concerned that the arrest of the two accomplices in Apartment [redacted] could trigger a warning to the occupant of Apartment [redacted] that the police were on their trail. Within this context, it was logical for Respondent's suspicions to be heightened when he heard one of the arrestees ask that a third party be contacted. *See People v. Ellison*, 46 A.D.3d 1341 (Fourth Dept. 2007) (accomplice arrest within close proximity of apartment known to have narcotics justified warrantless entry to secure the evidence) Although there was no

information at the time that this particular suspect was armed, the fact that the location and welfare of the undercover was unknown was an added safety concern, albeit not a determinative factor.

Second, what Respondent observed at the door of [redacted] upports a finding that he was reasonable in his assessment that McClendon was attempting to destroy evidence. Although as a precaution a sergeant was stationed at the rear of the building to prevent flight or disposal, what Respondent heard inside the apartment was cause for suspicion. McClendon repeatedly told Respondent that she was going to open the door but failed to do so. In the interim, Respondent heard "rustling" and the "moving around" of objects. Respondent also heard her walking from the door to the back of the apartment. As the events developed, these factors led him to conclude that she was "stalling" as she destroyed drugs or other evidence in her apartment. *See Kentucky v. King*, 131 S.Ct. 1949 (2011) (exigent circumstances justified the warrantless entry when an officer knocked on the door, got no response but heard items being moved around inside the apartment which he reasonably concluded were persons in the act of destroying evidence. Police action did not create exigency in these circumstances); *People v. Moore*, 195 A.D.2d 302 (First Dept. 1993) (that officers heard a "commotion" in the apartment as they sought entry established exigent circumstances); *People v. Chambers*, 52 N.Y.2d 923 (1981) (attempt to destroy evidence sufficient to justify warrantless entry to effect defendant's arrest)

Third, the nature of narcotics makes them particularly vulnerable to destruction under the circumstances confronted by Respondent. Courts have routinely acknowledged that narcotics are readily removable and have taken this into account when making a

determination as to exigency. In such cases, the known presence of police can raise a realistic expectation that any delay would result in destruction. *U.S. v. Santana*, 427 U.S. 38 (1976) This factor was even mentioned in *People v. Bero*, 139 A.D.2d 581 (Second Dept. 1988), a case cited by CCRB but distinguishable based on this point.[1]

Accordingly, this tribunal finds that the preponderance of the credible evidence failed to establish that Respondent entered McClendon's apartment without sufficient legal authority. Thus, he is found Not Guilty of the charge.

Respectfully submitted,

Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

JUN 18 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

[1] This tribunal reviewed all other cases submitted by CCRB in which courts found that exigent circumstances did not exist. These cases, however, are distinguishable in that accomplices were not arrested prior to the warrantless entry and there was no reasonable basis for the officer to believe that the suspect might have been warned of their imminent arrest.